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In the Supreme Court of the United States

OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, PETITIONER

v.

ROBERT L. DOWELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in reviewing a finding that the Oklahoma City public schools had achieved unitary status, the court of appeals erred in declining to terminate the ongoing desegregation decree.

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INTEREST OF THE UNITED STATES

This case presents the question whether a school district that has been found to be "unitary" is entitled to be released from a desegregation decree. The United States, which has responsibility for enforcing school desegregation under Titles IV, VI, and IX of the 1964 Civil Rights Act, 42 U.S.C. 2000c-6, 2000d, and 2000h-2, and the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.*, is currently involved in approximately 500 school desegregation cases, many of which may be affected by the disposition of this case. For that reason, the United States participated as amicus curiae in both the district court and court of appeals in this case.

STATEMENT

A. The Racial Segregation Of The Oklahoma City Public Schools And The Imposition Of The Finger Plan

1. In 1961, black parents filed an action challenging racial segregation by the Oklahoma City public school system. The

case was assigned to Judge Luther Bohanon, of the United States District Court for the Western District of Oklahoma. In 1963, after extensive hearings on the issue, Judge Bohanon found that Oklahoma City had segregated its students by law, resulting in schools that were either all-white or all-black. 219 F. Supp. 427 (W.D. Okla. 1963). The court also found that the city's residential patterns were significantly segregated, in large part because of restrictive covenants and the enforcement of state and local laws mandating residential segregation. *Id.* at 433-434. See also 244 F. Supp. 971, 975-978 (W.D. Okla. 1965); 307 F. Supp. 583, 590-591 (W.D. Okla. 1970). The court found that, as a result of segregated housing practices, nearly all of the black population of the city lived in the "central east" area. 219 F. Supp. at 433-434.

In 1965, the court found that the School Board's attempt to desegregate through the use of neighborhood zoning had not succeeded. In particular, Judge Bohanon determined that the proposed neighborhood zones would maintain racially separate schools, given the extensive residential segregation in Oklahoma City. 244 F. Supp. at 975-978. As of the 1971-72 school year, the schools remained significantly segregated. While the overall racial balance of the district was 76.6% white and 23.4% black (338 F. Supp. 1256, 1259 (W.D. Okla. 1972)), 78% of the district's 114 schools were 90% or more one race (*id.* at 1260). Seventy-six of the 86 elementary schools were racially identifiable, with 16 nearly all-black and 60 all-white (*ibid.*).

2. In February 1972, Judge Bohanon ordered the School Board to implement a desegregation plan known as the Finger Plan, after the plan's author, Dr. John A. Finger. See 338 F. Supp. 1256. Under the Finger Plan, all of the majority-white elementary schools were reorganized to serve grades 1-4 of both races, while the majority-black schools became "fifth grade centers," which both black and white students would attend after completing fourth grade. To desegregate the elementary schools, black students would be bused from their neighborhoods to the former white schools for grades 1-4, and white students would be bused from their neighborhoods to the fifth grade centers. Kindergarten students would continue to attend

their present schools, but parents of kindergarteners would be permitted to send their children to the school of their choice. Middle schools (grades 6-8) and high schools (grades 9-12) would be desegregated through new attendance zones and feeder patterns. 606 F. Supp. 1548, 1552 (W.D. Okla. 1985).

Finally, the Finger Plan provided that elementary schools located in integrated neighborhoods (those with a racial balance within 15% of the district-wide balance) could operate as K-5, without busing obligations. Those schools were termed "stand alones." As new residential areas became integrated, students from those areas would be assigned to a neighborhood stand-alone school, and any student assigned to that school as part of the busing plan would be assigned elsewhere. 606 F. Supp. at 1552.

B. The District Court's 1977 and 1985 Unitariness Findings And The First Reversal By The Court Of Appeals

1. On June 2, 1975, after operating the Finger Plan for several years, the Board filed a "Motion to Close Case." The Board argued that it had "eliminated all vestiges of state-imposed racial discrimination in its school system and [was] * * * operating a unitary school system." 606 F. Supp. at 1551.

After receiving evidence concerning desegregation in the Oklahoma City public schools, Judge Bohanon granted the motion and issued an "Order Terminating Case." He found that the Board had "operated the Plan properly" and stated that he did "not foresee that the termination of * * * jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before the Court." 606 F. Supp. at 1551. The court concluded that in view of the school district's unitary status, the Board was "entitled to pursue in good faith its legitimate policies without the continuing constitutional

supervision of this Court." *Ibid.* Accordingly, the court ordered the dissolution of the committee charged with implementing the 1972 decree and stated that "*[j]urisdiction* in this case is *terminated* ipso facto subject only to final disposition of any case now pending on appeal." *Ibid.* The plaintiffs did not appeal the Order Terminating Case.[1]

2. a. Notwithstanding the order declaring the district to be unitary and terminating the court's jurisdiction, the Board continued to implement the Finger Plan over the next eight years. 606 F. Supp. at 1551. By mid-1984, as more and more neighborhoods became integrated, an increasing number of elementary schools qualified for "stand alone" status. Two adverse implications of that otherwise favorable development were noted. First, since the stand-alone schools were located between the black residential area (in the central-east part of the district) and the more heavily white areas (on the outside areas of the district), the length of the bus rides for young black students in grades 1-4 to schools that were not yet stand alones would significantly increase. Second, the creation of more stand alone K-5 schools would disrupt the fifth-grade centers by reducing the available pool of fifth-grade children. *Id.* at 1552.

By virtue of the problems posed by the increasing number of stand-alones—and because of a perceived decline in parental and community support for the elementary schools—the Board decided on December 17, 1984, to adopt a Student Reassignment Plan (SRP) for the 1985-1986 school year. Under the SRP, a neighborhood assignment system would be implemented for grades K-4, thus eliminating busing for those grades. Busing would be retained, however, for the fifth grade centers, as well as for the middle schools and high schools. In addition, the Board approved a "majority to minority" transfer policy, under which any elementary school student could transfer from a school in which his race was in the majority to a school in which his race was in the minority. All faculties and staff were to remain integrated, and an "equity officer" would be engaged to ensure continued equality of facilities, equipment, supplies, books, and instructors in all schools. 606 F. Supp. at 1552.

[1] Over the next eight years, moreover, although minor modifications in the Finger Plan were adopted by the Board, the plaintiffs did not seek to revive or reopen the case. 606 F. Supp. at 1551.

b. On February 19, 1985, the respondents filed a Motion to Reopen the case, challenging the constitutionality of the SRP. They contended that the school system had not achieved unitary status, and that the new plan would create racially identifiable neighborhood schools.

On April 25, 1985, Judge Bohanon rejected that challenge and denied respondents' motion to reopen. 606 F. Supp. 1548 (W.D. Okla. 1985). He explained that in issuing the 1977 Order Terminating Case, the court had "totally relinquished its jurisdiction over this case," having been "convinced that the Finger Plan had been carried out in a constitutionally permissible fashion and that the School District had reached the goal of being a desegregated non-racially operated and unitary school system." *Id.* at 1554. In light of the 1977 order, the court added, respondents were "collaterally estopped from relitigating the issue of the unitary character of the Oklahoma City Public Schools as of 1977." *Id.* at 1555.

The court also found that the system had "remain[ed] unitary" as of 1985. 606 F. Supp. at 1555. In particular, the court observed, "[i]t has now been thirteen years since cross-town busing was introduced and almost twenty-five years since the start of desegregation litigation in Oklahoma City." *Ibid.* The court explained that "[t]he School Board, administration, faculty, support staff, and student body are integrated. Further, transportation, extracurricular activities and facilities within the school district are equal and nondiscriminatory." *Ibid.* Indeed, the court noted, "[a]t present, racial balance within 15 percentage points of the proportions in the system-wide student population is maintained in all classes in grades 1-12 through busing." *Id.* at 1553.

In light of its continued unitariness, Judge Bohanon held that the District was entitled to adopt the new SRP for grades K-4. "[O]nce a school system has become unitary," the court explained (606 F. Supp. at 1555-1556), "the task of a supervising

federal court is concluded." At that point, "district court intervention is normally not necessary unless there is a showing that the school district 'has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools.' " *Id.* at 1556. The court concluded that "[t]he Student Reassignment Plan was not created for the purpose of discriminating on the basis of race." *Ibid.* To the contrary, the court found, the new plan was adopted for "legitimate purposes: to protect against the loss of schools in the northeast quadrant of the district; to maintain fifth year centers throughout the district; to reduce the busing burden on young black students; to increase parental and community involvement in the schools; and to improve programs and provide elementary children with a greater opportunity for participation in extracurricular activities." *Id.* at 1553-1554. The court therefore upheld the SRP and denied the motion to reopen the case.

3. The court of appeals reversed. 795 F.2d 1516 (1986), cert. denied, 479 U.S. 938 (1987). The court first examined the 1977 order, concluding that "[n]othing in the 1977 order tempered the 1972 mandatory injunction." 795 F.2d at 1519. To the contrary, the court stated, the 1977 order indicated that "the court intended the 1972 order to retain its validity and prospective effect." *Ibid.* Moreover, the court held, the fact that the district court had declared the school district unitary did not mean that the decree had been lifted or that the Board was free to adopt a new plan. To be sure, the court observed, the 1977 unitariness finding "terminated active supervision over this case" and reflected that "the original purpose of the lawsuit had been achieved and that the parties had implemented a means for maintaining that goal." *Id.* at 1520. The court also acknowledged that the unappealed 1977 finding "was binding upon the parties." *Id.* at 1522. But because the district court had not "specifically dissolv[ed] its decree," the court of appeals held that the School Board was not relieved of its continuing "duty to persist in the elimination of the vestiges of segregation." *Id.* at 1520. The court stated that "[i]t is only when the order terminating active supervision also dissolves the mandatory injunction that the governing board regains total independence from the previous injunction." *Id.* at 1520-1521.

Having concluded that the School Board was still subject to the desegregation decree, the court next held that respondents were entitled to reopen the case to challenge the SRP. In assessing respondents' challenge, the court explained, the district court must not "lightly" permit a change in the underlying decree. "Having once determined the necessity to impose a remedy, the court should not allow any modification of that remedy unless the law or the underlying facts have so changed that the dangers prevented by the injunction 'have become attenuated to a shadow,' * * * and the changed circumstances have produced 'hardship so extreme and unexpected' as to make the decree oppressive.' " 795 F.2d at 1521, quoting *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). The court of appeals therefore remanded the case to the district court "to determine whether the original mandatory order will be enforced or whether and to what extent it should be modified." 795 F.2d at 1523. The court added that on remand the Board "must present evidence that changed conditions require modification or that the facts or law no longer require the enforcement of the order." *Ibid.*

C. The District Court's 1987 Unitariness Finding And The Second Reversal By The Court Of Appeals

1. Addressing the question posed by the court of appeals—"whether the School Board has shown a substantial change in conditions warranting dissolution or modification of the 1972 Order" (Pet. App. 5b)—the district court found that "over time, demographic change in Oklahoma City has rendered the 'stand-alone' feature in the Finger Plan inequitable and oppressive." *Id.* at 23b. The court reiterated that, without a change in the Plan, the growing number of stand alones would have "increase[d] the busing burden, in terms of time and distance, on young black children in grades 1-4" (*id.* at 21b), and would have "caused the student population at the fifth-year centers located in the east inner-city area to drop" (*ibid.*). Conversely,

the court found, the move to a neighborhood K-4 plan had increased parental and community involvement in the school system. *Id.* at 26b-27b.

The district court also found that the Board had taken "absolutely no action which has caused or contributed to the patterns of the residential segregation which presently exist in areas of Oklahoma City." Pet. App. 17b-18b. To the contrary, the court stated, "the actions of the Board of Education, through implementation of the Finger Plan at all grade levels for more than a decade, have fostered the neighborhood integration which has occurred in Oklahoma City." *Id.* at 18b. And the Board's continued, voluntary use of busing for grades 5-12, the court added, "cannot help but promote neighborhood integration and deter residential segregation in the future." *Ibid.*[2]

Finally, the district court found that the new K-4 plan had maintained the district's unitariness. The court noted that the neighborhood plan was adopted "without the intent to discriminate on the basis of race." Pet. App. 25b. Moreover, the court observed, although "many of the schools which were predominately black before the Finger plan was implemented are predominately black today because of the neighborhood plan," "discriminatory intent may not be inferred solely from the disproportionate impact of a particular measure upon one race." *Id.* at 28b-29b (emphasis omitted).[3] Taking all of the factors

[2] The evidence submitted to the trial court showed that since 1972, when the Finger Plan was first implemented, a significant number of black families had moved into areas throughout the school system; as a result, by 1980 there were no areas of the City that were more than 90% white. Def. Exhs. 1-4. Similarly, whereas prior to 1972 nearly 80% of black elementary schoolchildren had attended the black schools in the central east area (see Def. Exh. 36), by 1986—even after neighborhood zones had been restored for grades 1-4—only 40% of the black K-4 students attended the central east schools (Pltf. Exh. 27). And whereas in 1972 only 2.3% of the black children attended schools that were more than 95% white in the outer areas of the City (Def. Exh. 36), by 1986 fully 44% of the black children in grades K-4 were then attending those schools (Pltf. Exh. 27).

[3] The evidence before the trial court showed that under the new neighborhood school plan, there had been some resegregation of the school system. Whereas in 1986, the overall racial composition of the school district was 51%

together—including the composition of the student bodies, faculties and staff, and the community and administration attitudes toward the schools (*id.* at 29b)—the court found that "the Oklahoma City School District has remained unitary from 1977 to the present." *Id.* at 33b.[4]

Judge Bohanon then held that the decree he entered in 1972 should be dissolved. In making such a determination, Judge Bohanon explained, a court must "determine whether the 'purposes of the litigation,' as incorporated in the * * * decree, have been fully achieved." Pet. App. 35b. In the present case, the court stated, the purpose of the decree was "to dismantle the dual school system." *Id.* at 35b-36b. This objective, the court held, was achieved in 1977 when the District was declared unitary. *Id.* at 36b. "Moreover," the court added, "the school district's continued adherence to the fundamental tenets of the Finger Plan at all grade levels through the school year 1984-85 further insured that all vestiges of prior state-imposed segregation had been completely removed." *Id.* at 38b. The court concluded that "[u]ndoubtedly, after proper implementation for more than a decade, the dangers prevented by the 1972 decree have 'become attenuated to a shadow.' " *Ibid.* In short, "[w]hen the Oklahoma City School Board adopted its 1985 student assignment plan, it was unitary; and the purpose of this litigation had been fully achieved." And the achievement of uni-

white, 36% black, and 13% other (predominantly Hispanic), following the adoption of the SRP 11 of the 64 elementary schools had become more than 90% black. Def. Exh. 63; Pet. App. 11b-13b. Ten of those schools, moreover, were in the central east area and had been more than 90% black before implementation of the Finger Plan. Compare 338 F. Supp. at 1260 n.6 with Pltf. Exh. 27. On the other hand, less than half of the black children in grades 1-4 attended the 11 predominantly black schools, and none of the elementary schools with neighborhood zones were more than 90% white. Pltf. Exh. 27. The faculties of all the schools had also remained integrated. Def. Exh. 187.

[4] The evidence showed that from 1972 through 1984, through its operation of the Finger Plan, the Board had achieved and maintained in each public school a racial balance among students that was within 15% of the district-wide figures. Pltf. Exh. 13-25. In addition, the record showed that since 1970 faculties had been racially integrated. Def. Exh. 187.

tariness, the court concluded, "compels dissolving the 1972 decree." *Id.* at 39b.[5]

2. a. A divided court of appeals reversed (Pet. App. 1a-113a). Relying on *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), the court held that to secure a modification in a desegregation decree, a party must make " '[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions * * * to change what was decreed after years of litigation' " (Pet. App. 11a-12a). Because, in the court's view, " 'an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate' " (*id.* at 13a), the court explained that "the party seeking relief from an injunctive decree 'must demonstrate dramatic changes in conditions unforeseen at the time of the decree that both render the protections of the decree unnecessary to effectuate the rights of the beneficiary and impose extreme and unexpectedly oppressive hardships on the obligor' " (*id.* at 12a). Moreover, the court added, mere "termination of the wrongdoing" (*id.* at 13a), or "compliance [with the injunction] alone" (*id.* at 14a), does not justify a change in the decree. That is so, the court asserted, because "[t]he condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree absent the *Swift* showing" (*id.* at 13a).

The court next held that the district court's 1977 unitariness finding did not entitle the School Board to be released from the decree "without proof of a substantial change in the circumstances which led to the issuance of the decree." Pet. App. 16a. The court explained that while a finding of unitariness vitiates "the court's need for active jurisdiction," it does not abate the court's "power to enforce its equitable remedy." *Id.* at

[5] Having found the school district to be unitary, the district court explained that future actions by the Board would be measured by traditional equal protection standards, and not under an effects standard as respondents had urged. The court stated that the "1977 unitary finding signifies that the Oklahoma City Board of Education had satisfied its affirmative duty to desegregate by eliminating the dual school system. Since the Board had dismantled the dual system at the time it adopted its neighborhood plan, effect does not govern over purpose as plaintiffs suggest." Pet. App. 41b.

17a n.17. Accordingly, the court stated, because the decree "remain[ed] in place" when the Board instituted the new K-4 plan, the Board had a "heavy burden" under this Court's decision in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), "to show that its implementation of the Plan does not 'serve to perpetuate or reestablish the dual school system.' " Pet. App. 19a. The court held that the Board had not carried its burden under *Swann*. Reviewing the evidence, the court found that under the SRP there was an "emergence of eleven all-black elementary schools." *Id.* at 26a. Moreover, the court stated, the increasing number of stand-alone schools did not constitute "a hardship" that was both "extreme and unexpected." *Id.* at 27a.

Finally, again applying the rule in *Swann* (see Pet. App. 31a), the court held that the new K-4 plan did not maintain the unitariness of the district. The court acknowledged that "population shifts in the District" had warranted some change in the Finger Plan. *Id.* at 30a. But it concluded that the district court had erred in finding the SRP a constitutional response to the changed conditions. According to the court of appeals, the district court had "[u]nfortunately" focused entirely on the question of "the Board's alleged discriminatory intent in adopting the Plan." *Ibid.* In the majority's view, the district court should instead have looked at whether the new plan accommodates "the ehanged circumstances" while at the same time "maintain[ing] the continuing prospective effect of the decree." *Ibid.* In view of "the emergence of one-race elementary schools" (*id.* at 32a), and what the court termed "the growing parity of imbalance between faculty and students" (*id.* at 33a), the court found that the Board had not justified the new plan under the *Swann* test.

The court therefore remanded the case once again. It directed the district court to "[t]ake evidence of [respondents'] and [petitioner's] alternatives to maintain racially balanced elementary schools within the framework of the changed circumstances that have occurred in the District"; to "[m]odify the Finger Plan to accommodate the changed circumstances"; in modifying the Plan, to "assure that faculties achieve racial balance"; and to

"retain jurisdiction for a reasonable period of time to oversee the implementation and maintenance of these assignments." Pet. App. 44a-45a.

b. Judge Baldock dissented. Pet. App. 46a-113a. He explained that because the District had achieved unitary status by 1985, it was entitled to a "lifting of the decree" (*id.* at 79a) and was therefore not required to meet the *Swann* test in defending the new K-4 Plan. In imposing the *Swann* standard, Judge Baldock noted, the court had mistakenly applied the rules governing "dual systems charged with the affirmative duty to eradicate *de jure* segregation and its vestiges"; the present case, he added, is "very different," in that "this board has met its affirmative duty and no longer is under 'an unsatisfied duty to liquidate a dual system.' " *Id.* at 51a-52a. In light of the unitariness finding, respondents "were required to demonstrate that the district had lost its unitary status through purposefully segregative school board actions." *Id.* at 50a.

Applying an intent standard—rather than the rule in *Swann* applied by the majority—Judge Baldock concluded that the new K-4 Plan did not undermine the District's unitariness. Pet. App. 52a. He noted that "[t]he district court's finding concerning increased parental involvement caused by the neighborhood plan, * * * and the efforts of the district to provide improved educational opportunity for all, * * * are not clearly erroneous." *Id.* at 102a. In Judge Baldock's view, the majority had mistakenly evaluated the evidence "against an improper legal standard given the unitary status of the school district." *Id.* at 99a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals has held that the Oklahoma City School District remains subject to a desegregation decree, notwithstanding unitariness findings entered by the district court in 1977, 1985, and 1987. Although its opinion is not free of ambiguity, the majority appeared to believe that unitariness, without more, is not a sufficient basis for dissolving a decree. In the majority's view, "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate" (Pet. App. 13a); as a result, the court held that a decree can be dissolved only upon "a clear showing of grievous wrong evoked by new and unforeseen conditions." *Id.* at 11a-12a. What is more, the majority suggested, the achievement of unitary status cannot by itself meet that standard. As the majority put it, "[t]he condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree." *Id.* at 13a.

In our view, the court of appeals' apparent conclusion—that unitary status does not entitle a school district to be relieved of a desegregation decree—cannot be squared with decisions of this Court recognizing the purposes of, and equitable limitations on, injunctive decrees in school desegregation cases. Moreover, because the court of appeals misapprehended the implications of unitariness, it failed to address the logically prior question: whether the Oklahoma City public schools were, in fact, unitary at the time the school board adopted the neighborhood school plan. Having applied an erroneous legal standard, the decision of the court of appeals should be vacated.

A. In school desegregation cases, "[t]he transition to a unitary, nonracial system of public education was and is the ultimate end to be brough: about." *Green* v. *County School Bd.*, 391 U.S. 430, 436 (1968). But as this Court has many times emphasized, it is only "[d]uring this period of transition" that the courts are to "retain jurisdiction of these cases." *Brown* v. *Board of Educ.* (*Brown II*), 349 U.S. 294, 301 (1956). The court of appeals' contrary view cannot be squared with this Court's cases. More generally, the decision below cannot be reconciled with a fundamental equitable principle that informs the school desegregation cases: "judicial powers may be exercised only on the basis of a constitutional violation," *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). In the absence of a continuing violation, there is no basis for continuing judicial relief. The court of appeals' decision—which rests on a mistaken reading of this Court's decision in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932)—cannot be sustained.

In the present case, the district court's 1977 Order Terminating Case may well have constituted a finding of unitariness entitling the school district to be released from further judicial supervision. Because there is some confusion about the meaning of that order, however, the court of appeals must examine the 1977 order on remand. If the court of appeals concludes that the 1977 order constituted a declaration that the school district was unitary in the required sense, it must dismiss the lawsuit against petitioners.

B. If, on the other hand, the court of appeals concludes on remand that the 1977 order did not constitute a sufficient finding of unitariness, it must then address the question whether, as the trial court plainly *did* find, the Oklahoma City public schools were unitary in 1985, when petitioners adopted the neighborhood school plan for grades K-4. This Court has not had occasion to define what it means for a previously dual system to be "unitary"; what is more, "[a]ppellate courts have provided district courts with little guidance regarding how to determine whether a school system has achieved unitary status." *Pitts* v. *Freeman*, 887 F.2d 1438, 1445 (11th Cir. 1989). Since, in our view, the case must in any event be remanded, we believe it would be appropriate to provide the court of appeals, and the lower federal courts generally, with guidance on what constitutes a unitary school district.

We believe that three broad inquiries should inform the question of unitariness: (1) whether the district has continuously complied with the desegregation decree in good faith; (2) whether the school district has abandoned any and all acts of intentional discrimination; and (3) whether the school district has eliminated, as far as practicable, the "vestiges" of prior discriminatory conduct.

ARGUMENT

THE COURT OF APPEALS APPLIED AN ERRONEOUS LEGAL STANDARD IN DECIDING WHETHER TO TERMINATE THE OKLAHOMA CITY SCHOOL DESEGREGATION DECREE

A. A School District That Has Achieved Unitary Status Is Entitled To Be Released From A Desegregation Decree

1. The "objective" of a desegregation decree, this Court observed in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971), is "to eliminate from the public schools all vestiges of state-imposed segregation." "The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about." *Green* v. *County School Bd.*, 391 U.S. 430, 436 (1968). In meeting that obligation, a school district must ensure that it has desegregated "every facet of school operations"—including "student bodies, * * * faculty, staff, transportation, extracurricular activities and facilities." *Id.* at 435.

But this Court has never suggested that a district that becomes unitary nevertheless remains subject to the underlying desegregation decree. To the contrary, beginning with *Brown* v. *Board of Educ.* (*Brown II*), 349 U.S. 294 (1955), this Court has made clear that court-ordered desegregation of a school system is a process with both a beginning and an end. As *Brown II* clearly teaches, the purpose of a decree is "to effectuate a *transition* to a racially nondiscriminatory system," and it is only "[d]uring this period of transition" that the courts are to "retain jurisdiction of these cases." *Id.* at 301. Accord *Green* v. *County School Bd.*, 391 U.S. at 439 (jurisdiction should be maintained "until it is clear that state-imposed segregation has been completely removed"); *Raney* v. *Board of Education*, 391 U.S. 443, 449 (1968) (jurisdiction should be retained "until it is clear that disestablishment [of the dual system] has been achieved").

So, too, in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, this Court addressed at length the scope of permissible remedial measures, reiterating that injunctive relief is only temporary. "At some point," the Court emphasized, "school

authorities and others like them should have achieved full compliance with this Court's decision in [*Brown* v. *Board of Educ.*, 347 U.S. 483 (1954)]. The systems would then be 'unitary' in the sense required by our decisions in *Green* and *Alexander* [v. *Holmes County*, 396 U.S. 19 (1969)]." To be sure, the Court observed, "[t]his does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 402 U.S. at 31-32. See also *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706, 738 (1989) (Scalia, J., concurring in the judgment).

2. In this case, the court of appeals apparently took a different view. The panel majority suggested that unitariness, without more, does not entitle a school district to relief from a desegregation decree. Apart from showing unitariness, the court stated, a school district must also make "a clear showing of grievous wrong evoked by new and unforeseen conditions." Pet. App. 11a-12a. Unitariness is insufficient because, in the court's view, "[t]he condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree." *Id.* at 13a.

That principle cannot be squared with this Court's recognition that a desegregation decree is a "transition[al]" remedy (*Brown II*, 349 U.S. at 301), not a permanent state of affairs. Nor can the lower court's decision be squared with traditional equitable principles. Unitariness is the *object* of the decree. Once that object has been achieved, the decree no longer serves its intended function. At that point, principles of equity require that the decree be dissolved: "the scope of the remedy is determined by the nature and extent of the constitutional violation" (*Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974)), and judicial remedial powers may extend "no farther than required by the nature and the extent of that violation." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 399 (1982). As the Court explained in *Swann*, "judicial powers may be exercised

only on the basis of a constitutional violation," and "as with any equity case, the nature of the violation determines the scope of the remedy." 402 U.S. at 16. And precisely because those equitable principles are well settled, it is not surprising that the panel majority stands alone in holding that a court's authority over a school district extends beyond a proper finding of unitariness.[6]

3. Relying on *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), the court of appeals held that a school district seeking relief from an injunctive decree must demonstrate "dramatic changes in conditions unforeseen at the time of the decree that both render the protections of the decree unnecessary to effectuate the rights of the beneficiary and impose extreme and unexpectedly oppressive hardships on the obligor." Pet. App. 12a. In our view, the court of appeals misread *Swift*.

In *Swift*, several meat-packing companies moved to modify a consent decree, issued several years before, enjoining them from various monopolistic practices. Although this Court refused to modify the injunction, its decision recognized a court's inherent authority to alter a decree when the underlying circumstances have changed. As the Court put it, "[a] continuing decree of injunction directed to events to come is subject always to adapta-

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[6] See *Riddick* v. *School Bd.*, 784 F.2d 521, 535 (4th Cir.) ("once the goal of a unitary school system is achieved, the district court's role ends"), cert. denied, 479 U.S. 938 (1986); *United States* v. *Overton*, 834 F.2d 1171, 1175 (5th Cir. 1987) ("Attaining unitary status * * * means that a school board is free to act without federal supervision so long as the board does not purposefully discriminate; only intentional discrimination violates the Constitution"); *Spangler* v. *Pasadena Bd. of Educ.*, 611 F.2d 1239, 1242 (9th Cir. 1979) (Kennedy, J., concurring) ("When a court ordered remedy has accomplished its purpose, jurisdiction should terminate"); *Morgan* v. *Nucci*, 831 F.2d 313, 318 (1st Cir. 1987) ("although the court has produced no formula for recognizing a unitary school system, the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities"); *Jacksonville Branch, NAACP* v. *Duval County School Bd.*, 883 F.2d 945 (11th Cir. 1989) (once a district attains unitary status, "court supervision is no longer warranted"). In fact, a subsequent panel of the Tenth Circuit, in *Keyes* v. *School District No. 1*, 895 F.2d 659, 669 (1990), stated that a school desegregation decree "will terminate once the district is declared unitary."

tion as events may shape the need." 286 U.S. at 114. Many consent decrees, the Court observed, "involve the supervision of changing conduct or conditions and are thus provisional and tentative." *Ibid.* Accordingly, "a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *Id.* at 114-115.

On the facts of that case, the *Swift* Court did not find a sufficient basis for altering the decree. As the Court perceived the record, the meat-packers were "still in a position, even when acting separately, to starve out weaker rivals, or at least that the fear of such abuses, if rational in 1920, is still rational today." 286 U.S. at 117. And although the Court acknowledged that there had been some changes in the industry, it found no changes that bore "significantly upon the old-time abuses in the sale of other foods." *Ibid.* At the same time, *Swift* expressly recognized that where the decree's original purposes have been served, and there is no appreciable risk of renewed danger, a court enjoys full authority to terminate the injunction. As the Court put the matter in a later decision, "an injunction should be subject to modification when it appears that one or more of the restraints imposed are no longer needed to protect the public." *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 184 (1948).[7]

The court below relied, however, on a passage in *Swift* stating that the meat-packers had failed to prove that the injunction

[7] To be sure, the *Swift* Court emphasized that a party seeking relief from a decree bears an imposing burden of proof; "[t]he inquiry," as the Court put it, "is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow." 286 U.S. at 119. But while the burden of proof is rigorous, it is not insurmountable. To the contrary, as the Court has explained many times since *Swift*, "the settled rule of [this Court's] cases is that district courts retain power to modify injunctions in light of changed circumstances." *Dombrowski* v. *Pfister*, 380 U.S. 479, 492 (1965). Accord *Evans* v. *Jeff D.*, 475 U.S. 717, 726 (1986); *Arizona* v. *California*, 460 U.S. 605, 624-625 (1983). And that "well-established rule[ ] governing modification of even a final decree entered by a court of equity" is no less applicable in the special context of desegregation orders. *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 437 (1976).

was causing "grievous wrong evoked by new and unforeseen conditions"; citing that passage, the panel majority held that only "dramatic changes in conditions unforeseen at the time of the decree" could justify a termination of the Oklahoma City injunction. The cited language cannot bear so much weight. As the Court explained in *United States* v. *United Shoe Corp.*, 391 U.S. 244 (1968), the quoted passage "must, of course, be read in light of th[e] context" presented in *Swift*: a determination, on the facts presented, that "the danger of monopoly and of the elimination of competition which led to the initial government complaint and the decree had not been removed and that, although in some respects the decree had been effectuated, there was still a danger of unlawful restraints of trade." *Id.* at 248. Moreover, the *United Shoe* Court reiterated that when the purposes of the injunction *have* been fully served, the decree may be lifted. As the Court stated, "*Swift* teaches that a decree may be changed upon an appropriate showing, and holds that it may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree * * * have not been fully achieved." *Ibid.*

The panel majority's contrary reading would mandate perpetual decrees—and accompanying judicial supervision—as a general rule. Only "dramatically" changed and "unforeseen" circumstances could justify lifting a decree; the fact that the decree has served its purpose could never suffice—because it can hardly be viewed as unforeseen that a decree would accomplish its purpose.

4. Once a school district is declared unitary, and the decree is lifted, future conduct by the school authorities is once again governed by traditional equal protection standards, which prohibit only intentional acts of discrimination. *Washington* v. *Davis*, 426 U.S. 229 (1976). At that point, the local officials are no longer subject to obligations imposed on desegregating districts—that all actions must be measured simply by their *effect* on integration. See *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972); *Dayton Bd. of Educ.* v. *Brinkman*, 443

U.S. 526 (1979). As the Court stated in *Swann* (402 U.S. at 31-32):

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.[8]

We hasten to add that a declaration of unitariness, and a consequent termination of an effects standard, do not necessarily permit a return to a neighborhood plan. Intentional acts of racial segregation violate the Constitution and should be enjoined. In determining whether a proposed change in the student assignment plan suffers from such an illicit intent, a court may, of course, take into consideration both the segregative history of the school system and the foreseeability that the new plan will lead to racial imbalances. See *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-268 (1977). But once unitary, a school system should have available to it the same full range of legitimate educational choices – neighborhood schools, choice programs, magnet schools, and so forth – as other school systems.

5. In the present case, the district court declared the school system unitary in 1977, and the plaintiffs did not appeal from

[8] See also *United States* v. *Overton*, 834 F.2d at 1175 ("[a]ttaining unitary status * * * means that a school board is free to act without federal supervision so long as the board does not purposefully discriminate; only intentional discrimination violates the Constitution"); *Vaughns* v. *Board of Educ.*, 758 F.2d 983, 988 (4th Cir. 1985); *Riddick* v. *School Bd.*, 784 F.2d 521 (4th Cir.), cert. denied, 479 U.S. 938 (1986); *Pitts* v. *Freeman*, 755 F.2d 1423, 1426 (11th Cir. 1985).

that judgment. Even if erroneous, that judgment is now res judicata and, as the court of appeals itself observed, is "binding upon the parties." 795 F.2d at 1522. "The principles of collateral estoppel or issue preclusion are applicable to school desegregation cases." *Riddick* v. *School Bd.*, 784 F.2d 521, 531 (4th Cir.), cert. denied, 479 U.S. 938 (1986). See generally *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979).

There is some confusion, however, about precisely what the district court intended by its 1977 order.[9] How properly to construe Judge Bohanon's 1977 order is a question best left to the courts below. For his part, Judge Bohanon ruled in 1985 that his 1977 order *was* intended as a finding of unitariness in the required sense that "the School District had reached the goal of being a desegregated non-racially operated and unitary school system." 606 F. Supp. at 1554. Since that 1977 order was not appealed, it is not open to the court of appeals to question the *adequacy* of the unitariness finding. What was open to the court of appeals in 1986 – and what it should consider on remand from this Court – is whether the 1977 finding was *in fact* a finding of unitariness in the sense Judge Bohanon construed it in 1985. The court of appeals did not address this question because of its erroneous view that such a finding does not necessarily mean that judicial supervision must come to an end. If the court of appeals concludes that Judge Bohanon declared (whether rightly or wrongly) the school district unitary and therefore free from

[9] On the one hand, the order provided that the Board had "operated the Plan properly," had "slowly and painfully accomplished" a "unitary system," and was therefore "entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court." 606 F. Supp. at 1551. On the other hand, Judge Bohanon also stated that he did "not foresee that the termination of * * * jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system * * *." *Ibid.* The latter statement might suggest that Judge Bohanon did not intend the 1977 finding to release the Oklahoma City schools from the decree. If so, the school district would not have been found "unitary" in the required sense – a finding that entails "the mandatory devolution of power to local authorities." *Morgan* v. *Nucci*, 831 F.2d 313, 318 (1st Cir. 1987).

judicial oversight, it must dismiss the lawsuit on that ground; as we have explained above, such an unappealed finding is res judicata, and *Swift* imposes no further obligations on a unitary school district. If, on the other hand, the court concludes that Judge Bohanon did not intend to release petitioner from the decree in 1977, it must then determine whether the trial court's 1985 unitariness finding—which explicitly approved petitioner's decision to abandon the Finger Plan for grades K-4—was correct. We address the latter question below.

B. Because It Misunderstood The Consequences Of A Unitariness Finding, The Court Of Appeals Neglected To Consider Whether Oklahoma City Had, In Fact, Achieved A Unitary School System By The Time It Adopted The Neighborhood School Plan

As noted above, the case should be remanded for a determination whether the trial court's 1977 order in fact constituted a finding of unitariness. If the court of appeals concludes that the trial court in 1977 did *not* find the district to be unitary, it must then decide whether, as the trial court plainly *did* find, the school district was unitary in 1985, when petitioners adopted the neighborhood school plan. Because the court of appeals misunderstood the implications of a unitariness finding, it never addressed that question.

This Court has not had occasion to define what it means to be "unitary," and, more generally, "[a]ppellate courts have provided district courts with little guidance regarding how to determine whether a school system has achieved unitary status." *Pitts* v. *Freeman*, 887 F.2d 1438, 1445 (11th Cir. 1989). Because the case should in any event be remanded, we believe it would be appropriate to provide the court of appeals, and the lower federal courts generally, with much-needed guidance on what constitutes a unitary school district. In our judgment, three broad inquiries should inform the issue of unitariness: (1) whether the district has continuously complied in good faith with the desegregation decree; (2) whether the school district has abandoned any and all acts of intentional discrimination; and

(3) whether the school district has eliminated, as far as practicable, the "vestiges" of prior discriminatory conduct, as principally defined by this Court's decision in *Green* v. *County School Bd.*, 391 U.S. 430 (1968).

1. First and foremost, the school district must faithfully observe the dictates of the desegregation decree over a continuous period of time. As the First Circuit recently explained, "a sufficiently well-established history of good faith in both the operation of the educational system in general and the implementation of the court's student assignment orders in particular * * * indicate[s] that further oversight of assignments is not needed to forestall an imminent return to the unconstitutional conditions that led to the court's intervention." *Morgan* v. *Nucci*, 831 F.2d 313, 321 (1987).

The importance of faithful, consistent compliance is closely tied to this Court's decisions articulating the purposes of the underlying decree, and the broad discretion afforded to district courts in formulating such decrees. As the Court has explained, a trial judge "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Green* v. *County School Bd.*, 391 U.S. at 438 n.4. To pass constitutional muster, a plan must therefore "provide meaningful assurance of prompt and effective disestablishment of a dual system" (*id.* at 438)—thereby ensuring that the district will "convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (*Raney* v. *Board of Educ.*, 391 U.S. 443, 448 (1968)). Toward that end, a district court enjoys broad remedial authority—bounded, of course, by the scope of the constitutional violation and prudential limitations on judicial power—to fashion a decree that fully transforms the dual system "to a unitary system in which racial discrimination [has been] eliminated root and branch" (*Green*, 391 U.S. at 438). And should the decree prove inadequate to the task, the plaintiffs should promptly seek its modification, by moving for appropriate relief in the district court. Compare *United States* v. *Lawrence County School Dist.*, 799 F.2d 1031, 1043 (5th Cir. 1986) with *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. at 435-436.

It follows, in our view, that faithful, continuous compliance with such a well-conceived plan—a "plan that promises realistically to work, and promises realistically to work *now*" (*Green*, 391 U.S. at 439)—is compelling evidence that the school district has become unitary. By doing exactly what the trial court mandated, pursuant to the court's constitutional obligation to ensure the "effective disestablishment of a dual system" (*id.* at 438), a school district goes far in showing that it has fulfilled its duty under the Constitution. See *Spangler* v. *Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1244 (9th Cir. 1979) (Kennedy, J., concurring) ("compliance with the Pasadena Plan for nine years is sufficient in this case, given the nature and degree of the initial violation, to cure the effects of previous improper assignment policies"). At the same time, faithful compliance with the decree affords considerable assurance that the school board will not revert to its prior practices once released from further judicial oversight.

In assessing the board's compliance with the decree, two factors are central. The first is the *length* of compliance. Eliminating the effects of a segregated system that has been in place for many years cannot be accomplished overnight. "It should go without saying that a system does not become unitary merely upon entry of a court order intended to transform it into a unitary system." *United States* v. *Lawrence County School Dist.*, 799 F.2d at 1037. Conversely, effective implementation of a plan over a sustained period is strong evidence that the link between any remaining or prospective racial imbalances and the official dual system has been broken. In the present case, for example, the school district complied with the Finger Plan for thirteen years—during which time an entire school population, from kindergarten through twelfth grade, matriculated in a racially unidentifiable school system. Cf. *Ross* v. *Houston Independent School Dist.*, 699 F.2d 218, 227 (5th Cir. 1983) ("After twelve years of court-supervised desegregation efforts, this case has reached the stage where no benefit can be derived from further probing for the perhaps unmeasurable sins of the past").

The second factor is the *quality* of the board's compliance. In this connection, a court should consider whether the plaintiffs have been required to secure enforcement orders during the life of the decree, or, what is worse, have been constrained to obtain contempt citations against school officials.

2. In addition to faithful observance of the decree, a unitary school system may not adopt any new practices that discriminate among students on the basis of race. That is the central teaching of *Brown*. "To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 494. What is "[a]t stake," the Court reiterated in *Brown II*, "is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." 349 U.S. at 300.

3. Finally, a school district seeking to be declared unitary must demonstrate that it has eliminated the vestiges of its prior acts of discrimination. "The objective," the Court has noted, is "to eliminate from the public schools all vestiges of state-imposed segregation." *Swann*, 402 U.S. at 15.

a. The Court's cases have tied the concept of "vestiges" closely to the underlying discrimination. The pivotal case in that respect is *Green*. There, the Court looked "not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities." 391 U.S. at 435. Similarly, in *Swann*, the Court observed that "existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities" are "among the most important indicia of a segregated system." 402 U.S. at 18. And in *Keyes* v. *School District No. 1*, 413 U.S. 189, 196 (1973), this Court again focused on what have come to be known as the "*Green* factors." "In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration."

For three related reasons, we believe that the "*Green* factors" should be the primary focus of a court when it assesses the extent to which the "vestiges" of discrimination have been eliminated. First, those factors are the ones that most clearly identify a school as "Black" or "White." The racial stratification of the school itself—in its students, faculties, plant and equipment, and services and operations—is the plainest evidence of a dual system. Second, the *Green* factors are the most immediate byproduct of intentional racial discrimination in the school system and, indeed, provide the clearest evidence that school authorities have engaged in discriminatory conduct. Finally, because they are the most direct result of official discriminatory conduct, the *Green* factors are the most amenable to change through decree. These are the areas over which school officials generally have direct control. There is every reason, therefore, to impose on them an exacting standard to rid the system of the vestiges of discrimination in each of the areas identified in *Green*.[10]

The courts of appeals have generally taken the same approach in assessing whether a school district is unitary. In *Riddick* v. *School Bd.*, 784 F.2d 521, cert. denied, 479 U.S. 938 (1986), for example, the Fourth Circuit upheld a finding that the Norfolk school system was unitary and was therefore entitled to abandon a busing plan in favor of a neighborhood school plan. Relying on *Green*, the court explained that "[a]ll aspects of public education must be freed from the vestiges of state sanctioned racial segregation before a school system becomes unitary"—including, in particular, "the system's faculty, staff, transportation practices, extracurricular activities, facilities and pupil assignments." *Id.* at 533. In the case before it, the court of appeals observed, the trial judge had "reviewed all six factors set out in *Green* and found that Norfolk's school system had remained unitary since 1975." *Id.* at 534. Because "substantial evidence" supported those findings, the court of appeals upheld the trial court's unitariness determination. *Ibid.*

[10] Compliance with such a standard, however, "does not require any particular racial balance in each 'school, grade or classroom.'" *Milliken* v. *Bradley*, 418 U.S. 717, 740-741 (1974). See also *Swann*, 402 U.S. at 24.

More recently, the Eleventh Circuit applied the same principles in *Pitts* v. *Freeman*, 887 F.2d 1438 (1989). Noting the "six factors set forth in *Green*," the court stated that "[a] review of these six factors constitutes the best approach for determining whether a school system has eliminated the vestiges of a dual system." *Id.* at 1445-1446. Accordingly, the court held, if a school system "fulfills all six factors at the same time for several years, the court should declare that the school system has achieved unitary status. If the school system fails to fulfill all six factors at the same time for several years, the district court should retain jurisdiction." *Id.* at 1446 (emphasis omitted).[11]

b. The question remains, however, whether a court may look beyond the *Green* factors in determining whether a school district has eliminated the vestiges of racial discrimination. In any given case, discrimination in the school system may have wide-ranging implications for the society at large; any one of those implications, no matter how far removed, can theoretically be deemed a "vestige" of an original act of intentional discrimination.

Residential segregation provides one example. As this Court has noted, a practice of confining students of one race to particular schools will have a reciprocal effect on the development of other schools, "and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools." *Keyes*, 413 U.S. at 202.[12] At the same time, however, there may be "quite normal

[11] See also *Quarles* v. *Oxford Municipal Separate School Dist.*, 868 F.2d 750, 753 (5th Cir. 1989) (referring to "the six factors the Supreme Court has specified for consideration in determining whether a school system has achieved unitary status"); *United States* v. *Overton*, 834 F.2d 1171, 1176 (5th Cir. 1987); *Morgan* v. *Nucci*, 831 F.2d 313 (1st Cir. 1987); *United States* v. *Lawrence County School Dist.*, 799 F.2d 1031, 1034 (5th Cir. 1986).

[12] See also *Swann*, 402 U.S. at 21; *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 465 n.13 (1979) ("school segregation is a contributing cause of housing segregation"); *Pitts* v. *Freeman*, 887 F.2d at 1449 n.12.

pattern[s] of human migration [that] result[ ] in some changes in the demographics of * * * residential patterns," which may not be "attributed to any segregative actions on the part" of school officials. *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. at 436. See also *Swann*, 402 U.S. at 31-32. And even where housing patterns can, to some degree, be traced to segregation in the school system, such patterns typically also depend upon a wide array of private and other public factors. As a result, it may well be beyond the capability of school officials to alter residential patterns sufficiently to prevent housing segregation from affecting attendance patterns. See *Ross* v. *Houston Independent School Dist.*, 699 F.2d 218 (5th Cir. 1983).[13]

Because they are more remote from the original acts of discrimination, and more inherently intractable, the ripple effects of school segregation must be assessed, if at all, much differently from the *Green* factors. Courts should recognize, as this Court did in *Keyes*, that "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of * * * warranting judicial intervention." 413 U.S. at 211. Where a school board has (1) faithfully complied with a decree over a continuous period, (2) engaged in no new discriminatory practices, and (3) eliminated the vestiges of discrimination in all of the areas

[13] In *Ross*, the parties agreed that the school district was "unitary in every aspect but the existence of a homogeneous student population." 699 F.2d at 228. The plaintiffs opposed a finding of unitariness, however, on the ground that "the large number of one-race schools" resulted from "housing patterns" linked to the school district's "past segregative actions." *Id.* at 226. In rejecting that argument, the court of appeals acknowledged the ripple effect of prior school segregation, noting that "[c]urrent housing patterns may still show the lingering effects of school board actions that preceded the * * * desegregation order." *Ibid.* Nevertheless, the court of appeals explained that it was "not persuaded that the district judge was in error when he rejected the possible probative value of further proceedings to demonstrate that earlier housing patterns resulted from official school segregation policy apart from other community economic and social influence." *Id.* at 226-227. The court therefore upheld the trial court's finding that the school district had "done everything practicable at an intradistrict level to eradicate the effects of past segregative practices." *Id.* at 227.

identified in *Green*, the strong presumption should be that any further "vestige" of discrimination has been attenuated.

In the present case, the Court need not decide whether, and if so how, to assess the significance of residential segregation. The trial court examined the issue in detail and concluded that the Board had taken "absolutely no action which has caused or contributed to the patterns of the residential segregation which presently exist in areas of Oklahoma City." Pet. App. 17b-18b. To the contrary, the court stated, "the actions of the Board of Education, through implementation of the Finger Plan at all grade levels for more than a decade, have fostered the neighborhood integration which has occurred in Oklahoma City." *Id.* at 18b. On any view of the matter, those findings, if not clearly erroneous, are entirely sufficient.[14]

* * * * *

Because it misapprehended the implications of a unitariness finding, the court of appeals failed to resolve two logically prior questions: (1) whether the district court's 1977 Order Terminating Case constituted a finding of unitariness (whether correct or not), thus foreclosing further judicial superintendence of the Oklahoma City schools; and if not, (2) whether the district court erred when it found the schools to be unitary in 1985, prior to the adoption of the neighborhood school plan for grades K-4. In our view, a remand is therefore necessary.

[14] In making unitariness determinations, reviewing courts must be guided by the factual findings of the trial court, to the extent those are not clearly erroneous or subject to legal error. See *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. at 457 n.6; *Milliken* v. *Bradley*, 433 U.S. 267, 287 n.18 (1977); *Brown II*, 349 U.S. at 299; *Flax* v. *Potts*, 864 F.2d 1157, 1160 (5th Cir. 1989).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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